

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>LOUISE L. PELLETIER,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 88-0196 P</b>
	)	
<b>LOUIS W. SULLIVAN, M.D.,</b>	)	
<b>Secretary, United States Department )</b>	)	
<b>of Health &amp; Human Services,</b>	)	
	)	
<b>Defendant</b>	)	

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Social Security Disability and Supplemental Security Income appeal raises the question whether substantial evidence supports the Secretary's finding that the plaintiff has the residual functional capacity to perform her past relevant work and is therefore not disabled. The plaintiff claims that the Secretary erred in three respects: (1) his finding that the plaintiff could perform her past relevant work was not supported by substantial evidence; (2) he improperly restricted the plaintiff from questioning the vocational expert; and (3) he failed to find the plaintiff eligible for a closed period of disability.

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<sup>1</sup> This action is properly brought under 42 U.S.C. ' ' 405(g), 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court, pursuant to Local Rule 12 which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision, and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on January 23, 1990 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Services*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act ("Act") for the period July 27, 1986 through December 31, 1989, Finding 1, Record p. 16; that the plaintiff has not engaged in substantial gainful activity since July 27, 1986, Finding 2, Record p. 17; that the plaintiff suffers from "alcohol abuse, possible organic deficits, degenerative joint disease, borderline diabetes mellitus, obstructive pulmonary disease and bronchitis, and syncopal episodes," conditions which in combination are "severe," but that no impairment or combination of impairments meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 3, Record p. 17; that her allegations concerning her impairments and their impact on her ability to work "are not entirely credible in light of the degree to which she has required treatment, the findings made on examination, the statements of her treating and examining practitioners, and [her] own description of her activities," Finding 4, Record p. 17; that she has the residual functional capacity to perform "work-related activities except for work involving lifting and carrying objects weighing in excess of 20 pounds on a regular basis" and that her "ability to work on a regular and sustained basis is not significantly affected by her episodic alcohol abuse," Finding 5, Record p. 17; that the plaintiff's impairments do not prevent her from performing her past relevant work, Finding 7, Record p. 17; and that therefore the plaintiff is not disabled, Finding 8, Record p. 17. The Appeals Council declined to review the decision,<sup>3</sup> Record pp. 4-5, making it the

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<sup>2</sup> Fainting. *Taber's Cyclopedic Medical Dictionary* 1409 (14th Ed. 1983)

<sup>3</sup> The Appeals Council did consider the plaintiff's case in light of her submission of *Billings v. Bowen*, No. 86-0257-B (D. Me. Sept. 30, 1987); see Record pp. 324-332. It found the cases factually distinguishable and concluded that a change in the Administrative Law Judge's decision was not warranted.

final decision of the Secretary. 20 C.F.R. ' ' 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Services*, 869 F.2d 622, 623 (1st Cir. 1989).

In reviewing the decision of the Secretary, the standard of review is whether the determination made is supported by substantial evidence. 42 U.S.C. ' ' 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Services*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Services*, 647 F.2d 218, 222 (1st Cir. 1981).

At this stage of the evaluative process the burden is on the plaintiff to show she cannot perform her past relevant work. 20 C.F.R. ' ' 404.1520, 416.920; *Goodermote*, 690 F.2d at 6. In determining this issue, the Secretary must make a finding of the plaintiff's residual functional capacity, a finding of the physical demands of past work and a finding that the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. ' ' 404.1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at p. 809 (1983).

The plaintiff argues that the Secretary's finding that she can perform her past relevant work is not supported by substantial evidence because the medical advisor was unable to render a residual functional capacity opinion on a sustained longitudinal basis. She contends that her acute alcoholism renders her completely disabled and that she is unable to maintain any employment.

The Secretary argues that his decision is supported by substantial evidence. He contends that the plaintiff's description of her activities, her past work history, her medical history and the psychological opinion of the examining psychologist constitute substantial evidence to support his decision. The Secretary points to information furnished by the plaintiff indicating that she is able to attend Alcoholics Anonymous three times a week, Record pp. 33, 37, rehabilitation once a week,

Record p. 39, and adult education courses in pursuit of a high school diploma twice a week, Record p. 35, and that she is able to drive a car, Record pp. 34, 39. The record also reveals that the plaintiff was working throughout most of the period she claims to have suffered from chronic alcoholism. *See* Motion to Supplement the Record and exhibits attached thereto. In addition, the examining psychologist concluded that the plaintiff ``is capable of performing some level of gainful employment. Her alcohol abuse would not seem to be severe enough to warrant a claim for full disability." Record pp. 194-95.

To sustain her burden at this step of the evaluative process the plaintiff must prove ``that [her] alcoholism is *both* irremediable *and* sufficiently severe so as to disable [her], as a practical matter, from performing substantial gainful employment. Even proof of inability to control alcohol intake would not *per se* entitle an applicant to benefits; [she] still must show that this condition is a disabling one as defined by the Act." *Migneault v. Heckler*, 632 F. Supp. 153, 156 (D.R.I. 1985) (emphasis in original). Social Security Ruling 82-60 states that the determination of disability in cases where drug or alcohol abuse is alleged:

[ultimately depends] upon the severity of the impairment, as properly documented by the required medical findings, and, for appropriate cases, the limitation of function imposed on the applicant by the impairment in conjunction with applicable vocational factors. An individual may be a drug addict or an alcoholic and not be disabled if the evidence fails to show inability to engage in substantial gainful activity.

*Id.*, reprinted in *West's Social Security Reporting Service*, at p. 790 (1983). Here the plaintiff has failed to show that she suffers from any significant limitation of function, imposed by her impairment, which prevents her from engaging in substantial gainful activity. On the contrary, her past work history and her present activities indicate that she is fully capable of maintaining employment or worklike functions for long periods of time in spite of her chronic alcoholism.

The plaintiff's second argument is that the Administrative Law Judge erred when he prevented her from posing certain hypothetical questions to the vocational expert. *See* Record pp. 85, 87-91. Although ordinarily an Administrative Law Judge should allow a claimant to ask hypothetical questions if she feels the Administrative Law Judge's questions are inadequate, *see Torres v. Secretary of Health & Human Services*, 870 F.2d 742, 746 (1st Cir. 1989), the failure to do so here was harmless. The hypothetical questions the plaintiff posed were either: (a) not supported by evidence in the record,<sup>4</sup> *see Arocho v. Secretary of Health & Human Services*, 670 F.2d 374, 375 (1st Cir. 1982) (hypothetical must accurately reflect the evidence in the record), or (b) addressed issues outside of the scope of the vocational expert's function,<sup>5</sup> *see* 20 C.F.R. ' ' 404.1566(e), 416.966(e); Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service*, at p. 58 (Supp. 1989). In addition, the hypothetical questions posed by the Administrative Law Judge listed in ``a delineated fashion specific characteristics of the claimant and [her] impairments," *Torres*, 870 F.2d at 745; *see* Record pp. 80-82, and were supported by substantial evidence in the record. I conclude that the plaintiff was not harmed when the Administrative Law Judge precluded her from asking certain hypothetical questions.

Finally the plaintiff argues that the Secretary erred when he did not find her eligible for a closed period of disability. The plaintiff alleges that her disability began on July 15, 1985, rather than the original alleged onset date of July 15, 1986, and continued through July 15, 1987. She contends that

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<sup>4</sup> The plaintiff predicated some of her hypothetical questions on the assumption that she was intoxicated two weeks out of every eight-week period. Record pp. 84-86.

<sup>5</sup> The plaintiff posed hypothetical questions which required the vocational expert to develop a course of vocational treatment. Record pp. 86-87.

the three-month period that she worked in 1986 should be viewed as a trial work period and not as substantial gainful activity.

The regulations state that work ``you have done during any period in which you believe you are disabled may show that you are able to work at the substantial gainful activity level. If you are able to engage in substantial gainful activity, we will find that you are not disabled." 20 C.F.R. ' ' 404.1571, 416.971. Here the plaintiff admits working for three months in the first half of 1986 during the time she alleges disability. Therefore, the Administrative Law Judge's determination that the plaintiff was not disabled prior to the onset date originally alleged in her application is supported by substantial evidence.<sup>6</sup>

I conclude that there is substantial evidence in the record which supports the Secretary's finding that the plaintiff has the residual functional capacity to return to her past relevant work. Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

### **NOTICE**

***A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 12th day of February, 1990.***

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<sup>6</sup> The plaintiff's reliance on *Billings v. Bowen*, No. 86-0257-B (D. Me. Sept. 30, 1987), is misplaced. In *Billings*, a Step Five case, the court found that the Secretary had failed to sustain his burden of proving that the plaintiff could do other work during the alleged period of disability. Thus, *Billings* is inapplicable to this Step Four determination.

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*David M. Cohen*  
*United States Magistrate*